

United States Court of Appeals  
FOR THE NINTH CIRCUIT

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THE GRUEN WATCH COMPANY,

*Appellant.*

*vs.*

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS,  
LESTER COWAN, Individually; LESTER COWAN, Doing  
Business as Lester Cowan Productions, and BULOVA  
WATCH COMPANY, INC.,

*Appellees.*

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APPELLANT'S OPENING BRIEF.

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No. 12528

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## APPELLANT'S OPENING BRIEF.

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### Jurisdiction.

This is an appeal from a final judgment dismissing plaintiff's Second Amended and Supplemental Complaint on the ground that it failed to state a claim on which relief could be granted [R. 51-52], entered March 8, 1950, in the United States District Court, Southern District of California, Central Division [R. 52-53], and from an order concurrently made, striking certain portions of said Complaint on motion of certain of the defendants [R. 50]. Notice of Appeal was filed April 3, 1950.

Jurisdiction of the District Court was based on diversity of citizenship, 28 U. S. C. 1332(a)(1), the plaintiff being an Ohio corporation [R. 2] and the defendants being citizens of California or New York [R. 3]. Jurisdiction of this Court on Appeal is based on 28 U. S. C. §1291, §1294(1).

## Statement of the Case.

This action was brought to compel defendants to delete the name BULOVA and to restore the name GRUEN in a scene in a motion picture, and to recover damages arising from the substitution made in violation of plaintiff's contractual, business and property rights.

After plaintiff filed its Second Amended and Supplemental Complaint (hereinafter for convenience referred to as the Complaint) (1) all defendants moved to dismiss on the ground of failure to state a claim on which relief could be granted [R. 31-38] and (2) some of the defendants (but not defendant Bulova) moved to strike certain portions of the Complaint solely upon the ground that each of said portions was "immaterial" [R. 31-37]. The Court granted each of the motions [R. 50] and the correctness of these rulings is the sole issue on this appeal.

As will appear from our Argument, the correctness of the trial court's ruling on the motion to strike will be dependent upon this Court's ruling with respect to the grounds of recovery relied upon by plaintiff in seeking reversal of the judgment of dismissal. Hence, this brief will be devoted primarily to the motions to dismiss and only secondarily to the motion to strike.

The Complaint, including all exhibits, is of course set forth in full in the printed Transcript of Record [R. 2-29]. The Complaint (exclusive of the photostatic exhibit) is, for convenience, also set forth as an Appendix to this brief. Briefly, however, the Complaint may be summarized as follows:

In May, 1948, being about to produce a Marx Brothers motion picture, defendants Artists Alliance, Inc., Lester Cowan, and Lester Cowan Productions (referred to

in the Complaint as defendants Cowan and hereinafter for brevity referred to as the "producers" or "producer defendants") requested agreements from certain non-competing advertisers for the construction by such advertisers (including plaintiff Gruen) of special advertising signs and displays to be used in a certain scene in the motion picture. At that time the script for the motion picture did not contain a clock sequence or stunt but prior to entering any agreement, plaintiff's agent Kline conceived the sequence or stunt which was ultimately used by defendants [Compl. par. II; R. 4-5].

Thereafter, plaintiff orally agreed to construct and to permit the producers to use a sign and display advertising plaintiff's products, on condition that shots of such special sign and display would be used and displayed in the picture by said defendants [Compl. par. III; R. 5]. Concurrently it was orally agreed that in the event it became necessary to cut the scene containing plaintiff's display from the picture, or if the picture was not released to the general public before 1950, producers would pay the cost of the display [Compl. par. IV; R. 5-6]. Subsequently a written memorandum was executed which was intended to and did embody (both directly and by reference) the oral agreements just referred to. The memorandum was attached to the Complaint as Exhibit "A" [R. 20-22].

Plaintiff then constructed a specially designed advertising sign and display consisting of a large neon illuminated clock, swinging pendulum, and the words "GRUEN WATCH TIME." This special sign and display was conceived by and was the original idea of plaintiff. In August, 1948, it was used by the producer defendants in filming the motion picture "LOVE HAPPY," and was then returned to

plaintiff. The only use of the sign which was ever authorized by plaintiff was its use "for the purpose of advertising *plaintiff's* products through the medium of said motion picture." [Compl. par. VII; R. 7-8.]

After using plaintiff's sign and display in the production of the picture, to publicize this motion picture, the producers sought and obtained plaintiff's permission to use photographs of plaintiff's sign taken from the film for publication in Life Magazine. Plaintiff consented to this special use solely upon the understanding and belief that said defendants had finally determined that plaintiff's display was in and would remain in the film [Compl. par. VIII; R. 8-9]. Such photographs and a four-page article publicizing the motion picture actually appeared in Life Magazine [Exhibit "D" to Compl.; R. 25-29].

The producer defendants wrote plaintiff under date of September 10, 1948 [Exhibit "B" to Compl.; R. 22-23] and again under date of October 4, 1948 [Exhibit "C" to Compl.; R. 23-24] on each occasion sending plaintiff photographs of the action of "the Gruen Watch sign" in the film. In the first of these letters, the producers advised plaintiff among other things, "The sign gets a tremendous play in the picture and you will note that Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film" [R. 22-23], while in the second letter they advised plaintiff, among other things, "Our first release date on the picture will be Lincoln's Birthday with a world premiere in Cincinnati, followed by dates in Detroit, Chicago and New York." [R. 24.]

In reliance on the agreements and on the producers' representations and actions, and believing that its sign and display were definitely in the picture, plaintiff released publicity to its dealers and released the photographs (which producer defendants had sent it) for publication in jewelers' trade papers, which releases gave valuable publicity to the motion picture [Compl. par. X; R. 10].

After completion of the picture, and after the release of the Life Magazine article and photographs and after plaintiff's release of publicity to jewelers' trade papers and dealers, the producer defendants demanded that plaintiff pay at least \$25,000.00 allegedly for the purpose of "jointly advertising" the motion picture and plaintiff's products and said defendants advised plaintiff that unless the money were forthcoming they would not only remove the shots of plaintiff's display from the picture, but would in addition substitute shots advertising the product of one of plaintiff's major competitors. Plaintiff refused to comply with this demand [Compl. par. XIII; R. 12-13].

Defendant Bulova was aware of the obligations of the producers to plaintiff and of the other facts above set forth, but nevertheless defendant Bulova induced the producers, for a monetary consideration, to disregard their obligations to plaintiff and to delete the name GRUEN from the motion picture and substitute the name BULOVA, all with the intention of unfairly interfering with and injuring plaintiff's business [Compl. par. XIV; R. 13]. The producers would not have erased plaintiff's name from the motion

picture except for defendant Bulova's inducements [Compl. par. XVII; R. 15].

Thereafter, on April 20, 1949, defendants Cowan notified plaintiff they had eliminated and would not use any reference to plaintiff in the motion picture [Compl. par. XV; R. 13-14].

Thereafter, without any authority from plaintiff, defendants (1) altered the motion picture containing plaintiff's specially constructed sign and display by removing the name "GRUEN" therefrom, and (2) actually included plaintiff's special sign and display in the motion picture as released to the general public but inserted the name "BULOVA" in plaintiff's sign and display in place of the name "GRUEN" [Compl. par. XVI; R. 14].

As a result of the foregoing actions of the defendants, continuing injury and damage is being inflicted upon plaintiff, its business, dealer relationships, competitive position, reputation and good will (1) through the loss of unique and valuable advertising which plaintiff was entitled to receive and would have received if defendant Bulova had not intervened, (2) through the ridicule which plaintiff has been and will be subjected in the trade, if defendants are permitted to continue to show the motion picture containing plaintiff's special sign but with BULOVA's name inserted therein, and (3) through defendants' mutilation and use of plaintiff's specially designed and conceived sign and display to the advantage and profit of defendants with-

out plaintiff's consent and in derogation of plaintiff's rights [Compl. par. XVIII; R. 16-17].

On the foregoing facts, plaintiff asked for damages already sustained and for an injunction to prevent further misuse of its unique property [Compl. pars. XIX and XX; R. 17]. In addition, plaintiff charged that all of the acts of the defendants were wilful, malicious and oppressive for which reason punitive damages were likewise sought [Compl. par. XXI; R. 17-18].

With respect to producer defendants (defendants Cowan), the question is whether or not said defendants breached their contract with plaintiff or, even in the absence of such contract, whether they did not appropriate plaintiff's property right in a unique idea concretely embodied in its special sign and display. If the Complaint states such a claim against producer defendants it is equally clear that a similar claim is stated against defendants Bulova.

As to defendant Bulova, however, there is one further question presented, to wit: whether or not the Complaint states an additional claim for relief against said defendants for malicious interference with an advantageous business relationship, for such claim for relief may be sustained even if no binding contract existed between plaintiff and producer defendants.

The various theories of liability upon which plaintiff relies are more specifically set forth in the Specification of Errors immediately following and in the Argument.

## Specification of Errors.

The Specification of Errors relied upon on this appeal and intended to be urged herein are:

### I.

The trial court erred in granting the motion of the producer defendants to dismiss the Complaint for the reason that the Complaint does state a claim upon which all or some of the relief sought can be granted against said defendants, upon one or more of the following four (4) independent grounds or theories:

- (1) Breach of an express contractual undertaking to use plaintiff's name and display in the motion picture as finally released. (See Argument, Point I.)
- (2) Breach of implied covenants of good faith and to use plaintiff's name GRUEN in conjunction with plaintiff's display, if such display was used in the motion picture as finally released. (See Argument, Point II.)
- (3) By their course of conduct, the producer defendants (a) elected to use plaintiff's name and display, or (b) are estopped to deny such election. (See Argument, Point III.)
- (4) Wholly aside from plaintiff's contractual rights, producer defendants are liable for the wrongful and unauthorized use of plaintiff's display and the unique idea concretely embodied therein. (See Argument, Point IV.)



## II.

The trial court erred in granting the motion of defendant Bulova to dismiss the Complaint for the reason that the Complaint does state a claim upon which all or some of the relief sought can be granted against said defendant, upon one or more of the following three (3) independent grounds or theories:

- (1) Interference with plaintiff's contract with producer defendants. (See Argument, Point V.)
- (2) Interference with plaintiff's advantageous business relationship with producer defendants. (See Argument, Point V.)
- (3) Wholly aside from defendant Bulova's interference with plaintiff's contract or advantageous business relationship, said defendant is liable to plaintiff for the wrongful and unauthorized use of plaintiff's display and the unique idea embodied in said display. (See Argument, Point IV.)

## III.

The trial court erred in granting the motion of producer defendants to strike the several portions of the Complaint to which said motion was directed, for the reason that each of said stricken portions was in fact material to one or more of plaintiff's theories upon which it based its claim for relief.

Each portion of the Complaint designated in the motion to strike, is set forth in full in plaintiff's Statement of

Points to be relied on appeal [R. 57-67]. In order that this Court may readily consider the motion to strike, we have set forth as an Appendix to this brief, the entire Complaint (exclusive of the photostatic exhibit), and have underscored the material which was stricken. In addition, immediately preceding each stricken allegation, we have set forth in brackets the capital letter which corresponds with the letter specification in the motion to strike. In this manner the stricken material may be readily considered in its context in the Complaint without unduly lengthening the brief.

## ARGUMENT.

A consideration of this appeal cannot be made without reference at the outset to the following two important rules which are uniformly applied in the Federal Courts:

*First*, that a complaint will not be dismissed for failure to state a claim upon which relief can be granted which, when construed in the light most favorable to the plaintiff and with all doubts resolved in favor of its sufficiency, states a claim upon any theory upon which relief could be granted, F. R. C. P. 8(a), (e) and (f); *Leimer v. State Mutual Life Assurance Co.* (C. C. A. 8, 1940), 108 F. 2d 302, 304, 306; *Wooldridge Mfg. Co. v. R. G. La Tourneau, Inc.* (D. C. Cal., 1948), 79 F. Supp. 908; and

*Second*, that a motion to strike is not favored and will be granted only when the allegations have no possible relation to the controversy and, if the court is in doubt whether under any contingency the matter may raise an issue, the motion should be denied, *Radtke Patents Corporation v. C. J. Tagliabue Mfg. Co.* (D. C., N. Y., 1939), 31 F. Supp. 226; *Contogorge v. Spyrou* (D. C., N. Y., 1946), 7 F. R. D. 223, 227, 228.

With these two rules as a background, we will now consider the several legal grounds upon which plaintiff claims relief.

I.

**Plaintiff Is Entitled to Rely Upon All the Agreements and Acts Constituting the Entire Contract Alleged in the Complaint and Is Not Limited to the Letter Memorandum.**

Plaintiff contends that the allegations of Paragraphs II, III, IV and V of the Complaint [R. 4-6] set forth a contract, the breach of which gave rise to a claim for relief. The District Court, however, declined to give effect to most of these allegations on the ground that evidence of the oral agreements therein alleged would be inadmissible in view of the letter memorandum referred to in Paragraph V and attached to the complaint as Exhibit "A".

We believe the entire agreement between the parties was properly set forth in the Complaint and that there are two separate reasons why plaintiff should be allowed to prove that part of the agreement which is extrinsic to the letter memorandum, acceptance of either of which reasons is sufficient to require reversal of the judgment below.

- (1) **The Letter Memorandum Is, on Its Face, Incomplete, and Parol Evidence of Contemporaneous Oral Agreements Not Inconsistent With the Memorandum May Be Introduced, Particularly Where, as Here, the Memorandum Specifically Refers to Those Agreements.**

The letter memorandum contains four separate and distinct paragraphs, each dealing with its own subject matter.

Paragraph (1) of the memorandum deals with the "plans and intentions" of Cowan (the producer) with respect to producing a certain motion picture. [R. 20.]

Paragraph (2) of the memorandum deals with Cowan's "request" for certain "agreements" in connection with the

“use” of certain advertising signs and displays which Kline states he has obtained for Cowan pursuant to Cowan’s request. [R. 20-21.] Despite the fact that these agreements in connection with Cowan’s use of the signs go to the very heart of the transaction, *no* details thereof appear in the memorandum. It is obvious that these agreements dealing with the use of the signs should be before this court. The memorandum is a mere shell without them.

Paragraphs (3) and (4) of the letter memorandum of June 22, deal with an *entirely different* subject matter. [R. 21-22.] Neither of these paragraphs has anything to do with *anyone’s* rights or obligations to use or permit the use of the signs and displays. On the contrary, they deal solely with an abstract proposition, to wit, which party is to bear the “cost of construction” if the signs “are included” and which is to bear such cost if the signs “are not actually included.”

In other words, the language of Paragraphs (3) and (4) of the memorandum provide for the *results* which are to follow from inclusion or non-inclusion respectively, but they do not specify (a) whether one of the parties was to have the right of determining whether or not such inclusion was to take place, or (b) whether such determination was not in fact intended by the parties to be governed by matters beyond the control of either party. The language used is certainly not inconsistent with the second alternative, yet the trial court in sustaining defendants’ motions to dismiss, ruled that the producer had an absolute right of determination and that the other alternative could not possibly be considered.

The unfair and unrealistic results which defendants are attempting to achieve, can and should be avoided by clari-

fying Paragraph (2) of the memorandum (the only paragraph of the memorandum dealing with “agreements” in connection with “use” of the signs) by introducing the terms of the contemporaneous oral agreement to the effect that the plaintiff Gruen authorized the use of its special sign and display in consideration of the producer’s agreement to use it, and by clarifying Paragraphs (3) and (4) by reference to the further contemporaneous agreement that if through circumstances beyond the control of the producer defendants it became necessary to *cut* the scene containing plaintiff’s sign and display from the picture (it would then not be “actually included” in the picture) the producer would bear the cost of constructing the sign and display. The agreement would thus be rendered an integrated and sensible whole and would cover, as it was intended to cover, the agreements between the parties with respect to *use*. It is submitted that these contemporaneous oral agreements are not inconsistent with anything in the memorandum.

The law on the matter of admission of contemporaneous oral understandings where the written agreement is incomplete or the oral agreement is not inconsistent with or at variance with the written agreement, is so well settled that the citation of the following two cases should suffice for purposes of illustration.

In *Simmons v. Cal. Institute of Technology* (1949), 34 Cal. 2d 264, 209 P. 2d 581, the Supreme Court of California said:

“The promises of Dr. Clark were that the money, although *paid* to the Institute as a matter of administrative procedure, nevertheless was to be *used* exclusively for Impact Research. Therefore, the promise was directed to the matter of the *use* of the money,

whereas the terms of the memorandum dealt with nothing more than the *form of the payment* of it. These promises by Dr. Clark as to the use of the royalties were the fraudulent inducement, or motive, for the contract, but they were not incorporated in or superseded by the terms of the agreement as to payment. *The two are not inconsistent or 'at variance' inasmuch as they deal with wholly different matters.* It was, therefore, proper to receive parol evidence to prove the promises of Dr. Clark." (Emphasis added.)

*Simmons v. Cal. Institute of Technology* (1949),  
34 Cal. 2d 264, 274, 209 P. 2d 581.

To the same effect:

*Detsch & Co. v. American Products Co.* (C. C. A.  
9, 1945), 152 F. 2d 473, 474.

In addition, however, paragraph (2) of the memorandum makes specific reference to these "agreements." Since the parties themselves acknowledged the existence of these agreements and obviously did not consider them inconsistent with the rest of the memorandum, a court should not rule to the contrary, but should give effect to all portions of the agreement whether contained in the memorandum or referred to by it.

Several cases have given effect to this principle.

For example, in *Webb v. Cobb* (1926), 172 Ark. 255, 288 S. W. 897, 899, a building contract referred to work which should be done in keeping with "plans and specifications." The court approved the admission of parol evidence as to the "plans and specifications."

*Kellogg v. Snell* (1928), 93 Cal. App. 717, 270 Pac. 232, is also in point. This was an action upon a contract for the purchase of shares of a corporation. The con-

tract provided that the buyer would "accept a position with said bank under conditions otherwise agreed upon." The court allowed the introduction of parol evidence to prove this contemporaneous agreement, relying upon the language quoted above as a reference to this contemporaneous agreement.

*Schmidt v. Cain* (1928), 95 Cal. App. 378, 380, 272 Pac. 803, is another case similar to the one at bar. Therein was involved a sales contract which began with the following language:

"In accordance with my verbal understanding I had with you at your office."

There was no mention in the contract of a warranty, but the buyer was allowed to prove such a warranty by parol evidence.

So in the case at bar, the memorandum is *absolutely silent as to who or what was to determine whether plaintiff's sign and display would or would not be included in the motion picture*, for which reason the contemporaneous oral agreement with respect to this point should have been considered by the court below.

(2) **The Letter Memorandum of June 22, 1948, Contains Ambiguities and Uncertainties Which May and Should Be Resolved by a Consideration of Extrinsic Evidence.**

We think it is well recognized that uncertainties and ambiguities commonly result when parties attempt to express themselves by means of a so-called "short letter" form of agreement. The letter memorandum involved in the present case is only two pages long, contains precisely forty-three lines, and is a good example of the deficiencies of such form of agreement. It contains several obvious



ambiguities and uncertainties which can only be clarified by reference to extrinsic evidence.

At the very outset, Paragraph (1) of the memorandum states that Cowan (the producer) has advised Kline of Cowan's "plans and intentions" with respect to a certain motion picture, but these plans and intentions are not set forth in the memorandum.

In the second place, in Paragraph (2) of the memorandum, reference is made to a "request" from Cowan but the memorandum gives no inkling as to the terms, extent or basis of Cowan's request. In the same Paragraph (2) we find reference to certain "agreements" in connection with Cowan's "use" of the signs and displays but no information as to the contents or terms of these "agreements" nor is the word "use" defined.

In the third place, in Paragraph (3) the word "included" appears, while in Paragraph (4), which dealt with the possibility of exclusion, the phrase "not *actually* included" is used. The use of the adverb "actually" was not accidental, and an opportunity to ascertain the reason for its presence should have been allowed. On its face, the word emphasizes the state of mind of the contracting parties in view of their concurrent oral agreement dealing with the possibility of the actual cutting of the scene from the picture.

Lastly, in Paragraph (4) of the memorandum, we find the words "substantially in the manner presently represented to you." Although this particular clause may not necessarily be material to the present dispute, it shows the

existence of representations outside of the face of the agreement, and demonstrates the fact that the memorandum standing alone is incomplete.

In similar situations the California authorities have uniformly admitted extrinsic evidence to resolve an ambiguity created where a document refers to another agreement or to a word not defined within the instrument itself, and amply support our contention that plaintiff should not be strictly confined to the forty-three lines of the letter memorandum.

In *Wachs v. Wachs* (1938), 11 Cal. 2d 322, 79 P. 2d 1085, a contract referred to "transactions" consummated as to any persons on a certain schedule. The trial court excluded evidence as to what the parties meant by reference to the word "transactions," but the District Court of Appeal reversed the judgment of the trial court on this and other grounds. The Supreme Court adopted as its own opinion that of the District Court which stated in part:

" . . . It cannot be said from a reading of the contract whether the word "transaction" was intended to convey the first or second meaning above suggested. It is one of those contracts where the words "consistently admit of two interpretations, according to the subject matter in contemplation of the parties" and in which "parol evidence might be admitted to show the circumstances under which the contract was made and the subject matter to which the parties referred." (Citations omitted.) The trial court should therefore

have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument.’ ”

*Wachs v. Wachs* (1938), 11 Cal. 2d 322, 326, 79 P. 2d 1085.

The District Court of Appeal set forth the considerations impelling such a rule in the case of *Body-Steffner Co. v. Flotill Products* (1944), 63 Cal. App. 2d 555, 147 P. 2d 84. In that case the words “as agents” and “brokerage 5%” appeared in different places in several contracts. The trial court excluded extrinsic evidence. The District Court of Appeal held the contracts to be ambiguous on their face and reversed the judgment of the trial court, saying:

“ . . . It may be conceded that if a court was compelled to construe the contracts here involved on their face and without the aid of extrinsic evidence they would be construed as contracts of sale, despite the typewritten words more appropriate to the relation of principal and agent. \* \* \*

“ . . . where extrinsic evidence is offered to explain inconsistent provisions in a contract courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists. ‘The true interpretation of every instrument being manifestly that which will make the

instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that *when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself.*'” (Emphasis added.)

*Body-Steffner Co. v. Flotill Products* (1944), 63 Cal. App. 2d 555, 561-562, 147 P. 2d 84.

Among numerous other cases announcing the same rule are:

*Universal Sales Corp. v. California Press Mfg. Co.* (1942), 20 Cal. 2d 751, 128 P. 2d 665;

*Woodbine v. Van Horn* (1946), 29 Cal. 2d 95, 104, 173 P. 2d 17;

*California Canning Peach Growers v. Williams* (1938), 11 Cal. 2d 221, 229, 78 P. 2d 1154;

*Kohl v. Lytle Creek Water and Improvement Co.* (1938), 24 Cal. App. 2d 353, 75 P. 2d 71;

*Crawford v. France* (1933), 219 Cal. 439, 444, 27 P. 2d 645.

Thus, in the last case just above cited (*Crawford v. France* (1933), 219 Cal. 439, 27 P. 2d 645), the Supreme Court of the State permitted extrinsic evidence as to the understanding of the parties where the contract referred to

a building "suitable for the needs of the owner." In that case, the court said:

"In addition it is to be noted that there exists an uncertainty upon the face of the contract. In paragraph (1) it is provided that 'the Architect is to design a hotel building suitable for the needs of the Owner' . . . This is such an uncertainty as may be cleared up by parol evidence as to the nature and character of the building which, within the contemplation and understanding of the parties at the time of the execution of the written contract, would be 'suitable for the needs of the Owner'."

*Crawford v. France* (1933), 219 Cal. 439, 444, 27 P. 2d 645.

Based upon the foregoing authorities, we respectfully submit that the order granting the motion to dismiss and the judgment of dismissal entered thereon were erroneous, because the allegations of the agreements between the parties which were extrinsic to the memorandum of June 22, 1948, but were referred to in that memorandum, should have been considered by the court. Likewise, we think it is clear that the ambiguities appearing on the face of the memorandum should be clarified by reference to the surrounding circumstances and concurrent oral agreements, as well as to the subsequent conduct of the contracting parties, prior to the time when defendant Bulova injected itself into the situation.

II.

**The Letter Memorandum Contained an Implied Obligation on the Part of Producer Defendants to Use Plaintiff's Name if, as Was the Case, Plaintiff's Sign and Display Was Used in the Motion Picture and Also an Implied Covenant of Good Faith With Respect to the Use of Such Sign and Display.**

It is well established that the courts will enforce essential covenants in an agreement which have been assumed by the parties to exist but which have not been expressly set forth. Some of the authorities to this effect are hereinafter discussed.

Although plaintiff believes that the letter memorandum by no means forecloses allegation and proof of the additional portions of the entire transaction between the parties, it is plaintiff's contention that even without reference to the express agreements extrinsic to the memorandum, there exists in the memorandum itself a necessarily implied obligation on the part of producer defendants (1) to use plaintiff's name if plaintiff's sign and display was itself used (as was the case) and (2) to use good faith in connection with its use of plaintiff's sign and display. This latter obligation imposed upon the producer defendants the duty, first, to use its best efforts to include plaintiff's sign and display in the picture with plaintiff's name appearing thereon, and second, to avoid the use of plaintiff's sign and display in the monstrous manner in which it ultimately utilized it in this case, to wit, with the name of one of plaintiff's competitors affixed thereto.

Paragraph (4) of the memorandum provides with respect to all the advertisers represented by Kline that producer defendants "will bear the cost . . . of . . . displays which are not actually included in the picture"

[R. 21] while Paragraph (3) provides that “the cost of constructing such . . . displays . . . will be borne by . . . [the advertisers] provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public” [R. 21]. Plaintiff believes that these paragraphs cannot be read without reaching the conclusion that the parties clearly implied that if the contemplated displays were *used* the name of the advertiser furnishing the display would appear in connection therewith.

In this respect the classic language of Judge Cardozo in a similar situation in *Wood v. Lucy, Lady Duff-Gordon* (1917), 222 N. Y. 88, 118 N. E. 214, seems appropriate.

“It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant’s indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. *A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed* (citations omitted). *If that is so, there is a contract.*” (Emphasis added.)

*Wood v. Lucy, Lady Duff-Gordon* (1917), 222 N. Y. 88, 118 N. E. 214.

Certainly the letter memorandum in question is instinct with an obligation barring defendants Cowan from doing what they did here, to wit: to use the plaintiff’s display, but to insert on the film the name of one of plaintiff’s principal competitors.

It is important to note that the letter memorandum itself does not anywhere contain any statement that the advertisers will construct any displays or will permit the use of them if constructed. Yet no one could seriously contend that there is not an implicit covenant so binding the advertisers. Unless there is similarly a co-existing implied obligation on the part of defendant producers to use the advertiser's name if the advertiser's display is used, to make good faith efforts to use the advertiser's display, and not to use the advertiser's display for the benefit of a competitor, the letter memorandum was no agreement at all for it would bind no one to do anything and would constitute only a vague statement of intention that the listed advertisers might build displays which defendants Cowan could use as and if they pleased.

This is one of the situations in which the courts have traditionally been willing to imply obligations not expressly set forth. Thus it has been said:

“This principle is often invoked where questions of mutuality are concerned. If the consideration relied upon for one executory promise is another, such other must itself be binding to constitute a legal obligation and a valuable consideration. *Although the promise relied upon as a consideration may not be expressly stated in any clause of the contract, still if it appears from the entire contract that such promise is intended, it will be as binding and as much a valuable consideration as though it were expressly stated.* Thus a promise to pay for realty agreed to be conveyed, or to permit the use of certain realty in consideration of the lease of other realty, may be implied from the entire contract. So a clause ‘machines to be returned by B



to A at the termination of the contract on her repayment of their original cost,' binds A to accept such machines and to repay their original cost." (Emphasis added.)

Page, *Contracts* (2nd Ed. 1920), Vol. 4, §2042, p. 3531.

The California courts have in similar situations recognized the necessity of implying terms where essential to carry out the intention of the parties.

Thus, in *Brawley v. Crosby Research Foundation, Inc.* (1946), 73 Cal. App. 2d 103, 112, 166 P. 2d 392, in which defendant contended that an exclusive licensing contract was invalid because it did not contain any promise by defendant to exploit the pump in question, the court said:

"In this, as in every contract, *there is the implied covenant of good faith and fair dealing*; that neither party will do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement. (Citations omitted.) *The law will therefore imply that under its agreement appellant was obligated in good faith and by its reasonable and best efforts to develop, exploit, produce and make sales of the rotary pump in question.*"

*Brawley v. Crosby Research Foundation, Inc.*  
(1946), 73 Cal. App. 2d 103, 112, 166 P. 2d 392.

To the same effect:

*Universal Sales Corp. v. California Press Mfg. Co.*  
(1942), 20 Cal. 2d 751, 771, 128 P. 2d 665.

So also in *Norfolk & N. B. Hosiery Co. v. Arnold* (*Court of Errors and Appeals*, N. J. 1900), 45 Atl. 608.

That was an action on written contract under which plaintiff was granted by defendant the exclusive use of certain patents for a specific period. It appeared that in accordance with the contract plaintiff had advanced purchase money for 105 sewing machines which defendant had then furnished to plaintiff. At the termination of the contract plaintiff offered to return the machines to the defendant, demanding the return of the cost price thereof. Defendant refused to accept the machines on the ground that the language of the contract gave her an option either to accept or to reject the machines at the end of the agreement period. Plaintiff appealed from a judgment for defendant on demurrer.

In reversing the judgment of dismissal, the court said:

“The language used is ‘that at the termination of the contract the machines were to be returned to her on her repayment of their original cost to the plaintiff.’ This imposed a mutual obligation on the one party to return, and on the other to accept and pay for, them.”

*Norfolk & N. B. Hosiery Co. v. Arnold* (Ct. of Err. & App. N. J. 1900), 45 Atl. 608, 609.

In relying on the language itself and also on a clearly expressed option elsewhere in the contract, the court held:

“It cannot, therefore, be reasonably conceived that Mrs. Arnold desired to reserve in this contract the option to take back machines, after they had been used 16 years, by paying the full amount that it cost to

produce them. That clause was inserted manifestly for the benefit of the plaintiff . . .”

*Norfolk & N. B. Hosiery Co. v. Arnold* (Ct. of Err. & App. N. J. 1900), 45 Atl. 608, 609.

In *Clayton & Waller, Ltd. v. Oliver* (1930), A. C. 209, the English courts in a decision affirmed by the House of Lords, awarded damages for loss of publicity as well as loss of salary where the defendant producers breached their contract employing the plaintiff actor to play one of three leading roles in a musical comedy. This element of damages for loss of publicity was based upon the existence of an implied obligation on the part of defendants to provide the plaintiff with an opportunity to act. The express terms of the contract covered only salary, prohibitions against the plaintiff acting elsewhere and extensions.

See also:

*Marbe v. Edwards, Ltd.* (1928), 1 K. B. 269.

In the last analysis, the existence and extent of any implied obligation must depend upon the particular instrument and transaction in question. Plaintiff will, therefore, refer to only one more analogous type of case wherein a fundamental obligation has been implied, namely, where a requirements contract imposes an obligation on the seller to supply all of the buyer's requirements without expressly imposing a reciprocal duty on the buyer to purchase all of his requirements from the seller.

Thus, in *Mills-Morris Co. v. Champion Spark Plug Co.* (C. C. A. 6, 1925), 7 F. 2d 38, there was an agreement

between the parties by which the plaintiff became a distributor of spark plugs manufactured by the defendant. The agreement specified the price and terms upon which the spark plugs were to be sold but did not obligate the plaintiff to purchase any plugs from the defendant. In this action the plaintiff was attempting to enforce the obligation of defendant to supply its requirements and the defendant contended that the contract was void for lack of mutuality. The court answered this contention as follows:

“Nor is the agreement lacking in mutuality because imposing no obligation to buy. Plaintiff had an established trade, and there was implied in the language referred to an obligation to buy from defendant all the plugs that plaintiff should actually, in good faith, and in the normal course of its business, require in supplying its trade. This was sufficiently definite in quantity to be binding.”

*Mills-Morris Co. v. Champion Spark Plug Co.* (C. A. 6, 1925), 7 F. 2d 38, 39.

The producer's obligation to make good faith efforts to use the plaintiff's display and name, in return for plaintiff's development and construction of the display and authority to use its name, arises not only as an “instinct obligation” but also from the general principles of estoppel further discussed under Point III, *infra*. In this connection plaintiff cannot believe that in equity and in good conscience, the defendant producer should be permitted to deny that

he is bound to retain the plaintiff's name on its display after :

- (1) requesting an agreement from an advertiser (whose business is not the building of motion picture sets) for the construction of and permission to use an unusual advertising display of such a nature as to intrigue the motion picture public, and
- (2) leading the advertiser to believe that in return for its efforts it was to receive publicity if the display was useable in the picture, and
- (3) inducing and requesting the release by the advertisers of publicity which was valuable to the producer.

Plaintiff submits that, regardless of lack of express provision to the contrary, a producer should not be permitted to lead a party to exert its best efforts to produce a satisfactory display, to release advertising including national magazine photographs, and then suddenly to demand in conspiracy with that party's major competitor an additional amount of money in return for proceeding further.

Anyone reading the Complaint must inexorably conclude that the ultimate result achieved by the defendants in this action is contrary to the manifest intent and understanding which plaintiff and the producer defendants must have had when they made their agreement with respect to the use of plaintiff's sign and display in the motion picture in question. The consideration to be "paid" by producer

defendants to plaintiff in the event plaintiff's sign and display was used, was to be the advertising value which plaintiff would receive. In case of such use, *no monetary consideration* was to move from the producers to plaintiff. If, on the other hand, plaintiff's sign and display was *not* included in the picture, producers agreed to pay to plaintiff the bare cost of constructing the sign. This latter provision was not for the benefit of the producers, but was for the benefit of plaintiff in that it would guarantee to plaintiff a portion of the expenditures which it put into the sign (it would not, for example, reimburse plaintiff for the time, thought and effort expended in the conception of the sign) in the event its sign and display was not used.

Nevertheless, in the present case the producer defendants (induced, aided and abetted by the defendant Bulova) after having actually included plaintiff's sign and display in the picture (by virtue of which plaintiff immediately became entitled to the consideration agreed upon, to wit: the *advertising value* of having its sign and display in the picture), nevertheless thereafter deleted plaintiff's name from the picture (in all other respects plaintiff's sign and display remained in the picture) and merely tendered to plaintiff the monetary consideration (the bare cost of the sign) which plaintiff had agreed to accept in the event the sign and display had not been used and actually included.

We submit that no such result was ever contemplated or intended by the parties, and indeed such result is directly contrary to the intention of the parties as disclosed by the memorandum, even if, for purposes of argument, we were to disregard entirely all matters extrinsic to the letter memorandum.

III.

By Virtue of Their Conduct During the Nine-Month Period Subsequent to the Execution of the Letter Memorandum, Producer Defendants Became Obligated to Use Plaintiff's Name on Its Sign and Display in the Motion Picture.

If we were to assume, solely for purposes of argument, that neither Point I nor Point II, *supra*, is well taken, that parol evidence with respect to the agreement is not admissible, that plaintiff is to be confined strictly to the letter memorandum of June 22, 1948, that the memorandum gave a right of election to the producer defendants, and that the memorandum otherwise on its face would permit the use of plaintiff's display without plaintiff's name (all of which we deny), *nevertheless* we submit that the events occurring subsequent to the execution of that memorandum were such as to bind the producer defendants to use plaintiff's name on its sign and display. This on the theory that the producers (defendants Cowan) either (1) made a binding election to so use the sign and display, or (2) are estopped to deny that they made such an election, or both.

(1) Producer Defendants Made a Binding Election to Use Plaintiff's Sign and Display.

The trial court apparently concluded that the allegations of election and estoppel were insufficient to state a claim, for in its decision it said:

"Cowan had complete freedom of action, as between the two methods of benefiting from the contract, up to and including the actual incorporation and use of the set-up in the 'final version' of the picture." Decisions on Motions dated February 27, 1950. [R. 48.]

We submit that in so ruling, the trial court completely overlooked the distinction between (1) an *election* as to which obligation will be performed and (2) the *performance* of the obligation which is elected. In other words, an irrevocable election *can* be made prior to the time of performance of the alternative in spite of the fact that the election might have been postponed until the time of performance.

Indisputable evidence of this distinction has been presented by the producers themselves, in that by their letter of April 20, 1949 [Compl. Par. XV; R. 13] those defendants advised plaintiff that they elected not to use the Gruen name, despite the fact that the picture had not then been released and was not released for some time thereafter. If defendants by such a mere letter could make an election, it seems self-evident that their earlier conduct and letters may be looked to as evidencing a contrary election and should be looked at by the ultimate trier of facts in determining whether a prior election had taken place. But the trial court held to the contrary.

The attempt by producer defendants to relieve themselves of the effects of their earlier election to utilize plaintiff's special sign and display by the mere device of advising plaintiff at a later date that they were eliminating plaintiff's name from the picture, is not unique. Others have endeavored (without success) in similar cases to reverse and withdraw from a position previously taken by them.

Thus in *Hankey v. Employer's Casualty Co.* (1943), Tex. Civ. App., 176 S. W. 2d 357, defendant insured plaintiff's automobile against theft. In case of loss due



to theft and in the event of the recovery of the automobile, the defendant had the right to choose whether to return to the plaintiff the automobile plus the decrease in value caused by the theft, or to return to the plaintiff the value of the automobile at the time of the theft. After the automobile was stolen the defendant notified the plaintiff that it elected to return the automobile plus the decrease in the value thereof, but up to the time of the filing of the complaint defendant had refused to return the automobile to the plaintiff.

On appeal it was held that the defendant had elected which performance it would render under the policy and hence had precluded itself from becoming the owner of the automobile. Therefore, its refusal to return the automobile to plaintiff amounted to a conversion and subjected the defendant to liability for exemplary damages. On motion for rehearing, the defendant took the same position as was adopted by the trial court in the instant case, asserting:

“The company could not exercise its option to return the car to the plaintiff, without doing so. If it failed to return the car to the plaintiff, then it had not exercised its option to return it to him, but had exercised its option to keep the car . . . .”

*Hankey v. Employer's Casualty Co.* (1943). Tex. Civ. App., 176 S. W. 2d 357, 362.

Defendant's argument was rejected by the court in following language:

“The insurance company is in error in its view that the option, . . . could only be accepted by returning it . . . *the insurance company by electing not to take the title to the automobile but to re-*

turn it to plaintiff, and communicating such election to plaintiff fixed the right of plaintiff to the title and ownership of said automobile . . .” (Emphasis added.)

*Hankey v. Employer's Casualty Co.* (1943), Tex. Civ. App., 176 S. W. 2d 357, 362.

The same result was arrived at in *Crane-Rankin Development Co. v. Duke* (1939), 185 Okla. 223, 90 P. 2d 883. Therein the plaintiff had granted the defendant corporation an option to purchase his interest in an oil well. The secretary of the defendant orally informed the plaintiff that the defendant had elected to exercise its option to purchase. Thereafter the defendant refused to complete the purchase and the plaintiff sued for breach of contract.

In upholding judgment for the plaintiff, the court made the following statement:

“*We believe the company is confusing performance with acceptance. We agree with the company's assertion that the option contract was unilateral, and imposed no obligation upon the company until it elected to exercise its right to avail itself of the offer held out to it. When it did so elect it thereby simply accepted the offer made by the other party, and, when it did accept, the terms specified in the option became obligations . . .*” (Emphasis added.)

*Crane-Rankin Development Co. v. Duke* (1939), 185 Okla. 223, 90 P. 2d 883, 884.

We do not think it is particularly important whether the matter be labeled an option, a choice, or an election. Thus, *although the court in the Hankey case spoke in terms of an option, the defendant really had alternative obligations*, either to return the car and the decrease in value thereof or to pay the value of the car at the time of the theft. In the case at bar the alternatives (according to the trial court's theory) were either to include the plaintiff's sign and display or to exclude it and bear the cost thereof. Hence, even on the trial court's theory, the cases are analogous, for in each there is or may be a *distinction* between the election and the performance under the election, and accordingly that election may be evidenced by something other than performance. Yet the trial court refused to acknowledge this possibility.

Some of the significant alleged declarations and acts indicating defendants' election are: The actual use of the sign in the production of the motion picture prior to the end of August, 1948, and the prompt return to plaintiff of the sign and display *without then tendering its cost* [Compl. Par. VII; R. 7-8]; the expression by producer defendants of their desire to publicize their motion picture in Life Magazine and the release of photographs of plaintiff's sign and display [Compl. Par. VIII; R. 8-9]; the letter of producer defendants to plaintiff under date of September 10, 1948, enclosing "photographs of the action of the Gruen Watch sign in the current Lester Cowan production" and advising plaintiff that "The sign gets a tremendous play in the picture and you will note that

Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film” [Compl. Par. IX; R. 9, 22-23]; the second letter of producer defendants to plaintiff under date of October 4, 1948, sending more “photographs of Harpo Marx swinging on the pendulum of the Gruen Watch sign,” and stating the “first release date on the picture will be Lincoln’s Birthday with the premiere in Cincinnati” [Compl. Par. X, R. 9-10, 23-24]; and finally, the actual publication in Life Magazine of action photographs showing plaintiff’s sign and display, accompanied by an article in said Magazine which refers to “the Marx Brothers’ forthcoming movie ‘LOVE HAPPY,’” this on February 7, 1949, just five days prior to the date (Lincoln’s Birthday) which producer defendants had set for the premiere [Compl. Par. XI; R. 10-11, 25-29].

Frankly, we have found it difficult to conceive of any acts or course of conduct which could more clearly evidence an election than those of the producer defendants in this case. As we have previously noted, the producers by their act of sending plaintiff their letter of April 20, 1949, not only recognized but affirmatively asserted that their claimed choice or option or right of election (whatever they may choose to call it), *could be exercised prior to the date of the release of the motion picture*. Having acknowledged that *principle*, we submit they are now in no position (and certainly not on a motion to dismiss which admits the truth of the allegations of the complaint) to contend as a matter of law that their course of con-

duct disclosed by the complaint could not on a trial on the merits be found by a court or jury to constitute an election to use plaintiff's sign and display in their motion picture.

(2) The Producer Defendants Are Estopped by Their Conduct and Plaintiff's Reliance Thereon From Denying That They Had Elected to Use Plaintiff's Sign and Display.

We are equally satisfied that the Complaint clearly sets forth all of the elements necessary to raise an estoppel against the producers' claim that they made no election until their letter of April 20, 1949.

The principle by which an estoppel or quasi-estoppel is raised against the producer defendants is well stated in 10 Cal. Jur., p. 646, Estoppel, Sec. 26:

“. . . one to whom two inconsistent courses are open and who elects to pursue one of them is afterwards precluded from pursuing the other.”

10 Cal. Jur. 646.

The Complaint herein expressly alleged that after having (1) actually used and included plaintiff's sign and display in the motion picture and (2) having returned it to plaintiff *without* tendering the cost thereof, the producer defendants *thereafter* (3) authorized the Life Magazine publicity, (4) furnished plaintiff with photographs of the action of its sign in the motion picture, (5) advised plaintiff of the release date of the motion

picture, and (6) permitted plaintiff to release publicity on the picture and Gruen's connection therewith to both the jewelers' trade papers and to plaintiff's dealers throughout the United States. The Complaint further alleges that this publicity was of value to the producer defendants and that plaintiff would not have permitted or taken such steps except in reliance upon the agreements, representations and actions of said defendants and plaintiff's belief that said defendants had finally determined to use its said sign and display [Compl. Par. X; R. 9-10].

In other words, having induced plaintiff to take steps which were certainly *not* called for by the letter memorandum of June 22, 1948, which steps are alleged to have been of value to the producer defendants and which steps plaintiff alleged it took *solely* in reliance upon its belief (induced by the producer defendants as aforesaid) that a final determination *had* been made, said defendants should not now be heard to assert that such determination had in fact not been made.

All of the elements of an estoppel or quasi-estoppel have been specifically alleged in the Complaint, and we respectfully submit that it does not lie in the mouth of the producer defendants on a motion to dismiss to argue that they are not estopped.

IV.

Defendants Had No Right to Use Plaintiff's Sign and the Idea Embodied Therein Except for the Purpose for Which Plaintiff Caused It to Be Conceived and Constructed and for Which It Was Bailed to Defendants Cowan.

It was expressly alleged in Paragraphs II and VII of the Complaint [R. 4-5, 7] that plaintiff *conceived the idea* for the sequence or stunt, and nothing in the Complaint indicates that plaintiff has ever consented to the use of this original idea by defendants *except* on the condition that plaintiff's name be a part thereof as originally photographed. Quite to the contrary, it was alleged that:

“At no time did plaintiff authorize defendants Cowan to use or utilize plaintiff's said special sign and display except for the purpose of advertising plaintiff's products through the medium of said motion picture; nor did plaintiff ever authorize defendants Cowan to permit any competitor of plaintiff to use or utilize or obtain any benefit from the use of plaintiff's said special sign and display.” [Compl. Par. VII; R. 8.]

It seems to us to be evident from the record that plaintiff's object in honoring the producers' original request and entering into the transaction of June, 1948, was to obtain for itself the valuable world-wide advertising which would necessarily follow from the inclusion of its novel sign and display in the Marx Brothers' motion picture. But by virtue of the acts of defendants, plaintiff's novel idea, sign and display has been included in the picture while its entire advertising value has been diverted to the defendants Cowan and Bulova.

Despite the foregoing the trial court apparently concluded that the producer defendants had an option to use the sign in their motion picture or not to use the sign and pay its cost, and from this premise reached the *non sequitur* that:

“The only penalty for not using the display is liability for price. . . . Cowan was free to do what he pleased with the property if he paid for it.”  
[R. 47.]

In other words, the trial court ruled that after having used the sign in the picture, the defendants could tender the mere cost of construction and then be absolutely free to use the sign and display as well as the ideas embodied therein without any further authority from or compensation to the plaintiff; all this despite the fact that the only condition under which producer defendants were authorized to pay off by means of such monetary consideration, was in the event of *non-user*.

We respectfully submit that the court’s analysis was clearly incorrect as well as being in direct conflict with California Civil Code, Section 1450:

“*Alternatives indivisible.* The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.”

California Civil Code, Sec. 1450.

. In other words, even if we were to assume that the producer defendants had the absolute right of election (which we deny) between user and non-user, still this



would not authorize or validate their present conduct of following one course (user) but tendering the consideration called for by the other (non-user). Nor would it authorize them to fail to elect *either* of the alternatives which they claim were open to them, but instead follow the course which they took in the present case.

We believe that a proper analysis of the letter memorandum makes it clear that plaintiff merely bailed its specially constructed display sign (and the idea embodied therein) to the producer defendants for the special purposes of the agreement. It was bailed for the purpose of being used in the motion picture (and it was so used!) in consideration of world-wide advertising accruing to plaintiff from the showing of the picture. Hence, even apart from plaintiff's literary property rights which likewise have been used without authority by the defendants in this action, plaintiff has the additional and separate right to prohibit the defendants from exploiting or retaining the fruits of their use of plaintiff's sign and display for a purpose which was never authorized by plaintiff.

The producer defendants have appropriated plaintiff's idea in two ways: (1) by appropriating to their own use the entertainment or stunt value of plaintiff's idea and display and (2) by selling the advertising value of the idea and display to defendants Bulova. Defendant Bulova in turn has induced the producer defendants to display Bulova's name in place of plaintiff's with full knowledge of plaintiff's rights, thus diverting to defendant Bulova

the advertising value which otherwise would have redounded to plaintiff's benefit.

The language of the court in *National Telephone Directory Co. v. Dawson Manufacturing Company & Chase Hotel Company* (1924), 214 Mo. App. 691, 263 S. W. 483, is peculiarly appropriate to the instant case. The court, in holding that injunctive relief was properly granted, said:

“ . . . in the present case the telephone company merely bailed its directories to the Chase Hotel Company for the specific purpose of being used by it in availing itself of the telephone service for which it had subscribed.

“If the defendants' scheme, as disclosed by the petition in the instant case, does not come within the narrow and technical formula of the doctrine of unfair competition, there can be no question that it comes within the broader reach of the doctrine as defined and applied by the courts in the more recent decisions. The petition discloses that the defendants purpose to pass off their own advertising medium as the advertising medium of the plaintiff, not merely by simulating the plaintiff's medium, *but by actually tacking their own medium upon that of the plaintiff.* By this unfair means the defendants purpose to place their advertising business in competition with that of the plaintiff. A more flagrant case of unfair competition is nowhere disclosed by the books. *In fact, the scheme is more than unfair competition; it amounts to an actual appropriation of the plaintiff's*

*property by the defendants to their own business purposes. A court of equity ought not to hesitate long to interpose its protection against a scheme of this character.”* (Emphasis added.)

*National Telephone Directory Co. v. Dawson, etc., Co.* (1924), 214 Mo. App. 691, 263 S. W. 483, 485.

There is no longer any doubt that the courts can and will prevent the appropriation of ideas which have been embodied in concrete form, including advertising ideas. Such protection was extended in the case of *Liggett & Meyer Tobacco Co. v. Meyer* (1935), 101 Ind. App. 420, 194 N. E. 206. That was an action to recover the reasonable value of a certain advertisement submitted by plaintiff to defendant in a letter which, among other things, stated that plaintiff trusted that his idea would be of sufficient value to merit a reasonable charge therefor. The idea, as described in the letter, consisted of:

“ . . . Two gentlemen, well groomed, in working clothes or in hunting togs apparently engaged in conversation, one extending to the other a package of cigarettes saying, ‘Have one of these,’ the other replying, ‘No, thanks; I smoke Chesterfields.’ ”

*Liggett & Meyer Tobacco Co. v. Meyer* (1935), 101 Ind. App. 420, 194 N. E. 206, 207.

Judgment was for plaintiff and defendant appealed urging as error the overruling of defendant’s demurrers and the giving of certain instructions. In affirming the judgment

of the lower court the Appellate Court, sitting *in banc*, said:

“ . . . The rules of the common law are continually changing and expanding with the progress of the society in which it prevails. It does not lag behind, but adapts itself to the conditions of the present so that the ends of justice may be reached. *While we recognize that an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself the concrete form which we find in the instant case, it is our opinion that it then becomes a property right subject to sale.* Of course, it must be something novel and new; in other words, one cannot claim any right in the multiplication table.” (Emphasis added.)

*Liggett & Meyer Tobacco Co. v. Meyer* (1935),  
101 Ind. App. 420, 194 N. E. 206, 210.

Among other things the court approved a certain instruction:

“ . . . The court instructs the jury that *one who knowingly receives, retains and uses, or otherwise deals with as his own, property or goods sent him by another, under such circumstances as indicate a sale thereof is intended, cannot escape liability to pay therefor, even though not expressly ordered or contracted for, by advising the sender that he does not want such property or goods, if in fact such person retains and uses, or otherwise deals with such goods or property as his own.*” (Emphasis added.)

*Liggett & Meyer Tobacco Co. v. Meyer* (1935),  
101 Ind. App. 420, 194 N. E. 206, 211.

The instant case does not even involve a sale but merely an agreement whereby defendants Cowan were authorized to use plaintiff's special sign and display embodying their unique idea, for a certain limited and specified purpose, and in consideration of the advertising benefits resulting if used. Clearly the defendants in this case have gone far beyond the authorized purpose and have deprived plaintiff of the consideration plaintiff was led to expect.

In the *Liggett & Meyer* case, *supra*, the compensation requested by the plaintiff in his letter was a reasonable charge for his idea and this was granted by the court. In the case at bar the compensation agreed to be "paid" to plaintiff if its sign was used was the advertising value which plaintiff would derive from the display of its name on the clock in the picture. Not only is there nothing in the Complaint to indicate that plaintiff ever consented to use of its idea under any other condition or for any other purpose, but as previously noted, the affirmative allegations in the Complaint are directly to the contrary [Compl. Par. VII; R. 7-8].

Actually the defendants Cowan are attempting precisely the subterfuge which was denounced by the court in the *Liggett & Meyer* case, *supra*, that is, while they advised plaintiff by their letter of April 20, 1949 [Compl. Par. XV; R. 13], that they would not use plaintiff's name they are in fact using plaintiff's idea, sign and display in the picture and have sold the advertising benefits thereof to defendants Bulova.

V.

**Defendant Bulova Is Also Liable to Plaintiff for Inducing Breach of Contract, or Even if Plaintiff Had Only a Contract Terminable at Will, for Wrongfully Inducing Termination, and for Interference With Plaintiff's Advantageous Business Relationship.**

In addition to its liability to plaintiff for having wrongfully appropriated plaintiff's property rights, including its unique idea (Point IV, *supra*), defendant Bulova is likewise liable to plaintiff upon one or both of the two additional grounds discussed under the following two sub-headings.

**(1) If a Breach of Contract Claim Is Stated Against the Producer Defendants, Defendant Bulova Is Liable for Wilfully Inducing Such Breach.**

The decision of the trial court dismissing the Complaint recognized that if there was a contractual obligation on the part of producer defendants to include plaintiff's name on its sign and display in the motion picture, then the Complaint stated a claim against defendants Bulova for inducing breach of contract [R. 48]. Hence, it seems unnecessary to cite authorities in support of plaintiff's claim against defendants Bulova based upon their having wilfully induced a breach of contract.

(2) Even if Plaintiff's Contract With Producer Defendants Were Held to Be Merely a Contract Terminable at the Will of Producer Defendants a Claim Is Nevertheless Stated Against Defendant Bulova for Unjustifiably Inducing the Termination Thereof.

Even if plaintiff's agreement with the producer defendants were held to be only a contract terminable at the will of the producer, nevertheless a claim is stated against defendant Bulova for intentionally and unjustifiably inducing the termination of the contract. The Complaint specifically alleges that in the absence of the malicious inducement of defendant Bulova, the producers would not have erased the name Gruen from the motion picture [Compl. XVII, R. 15; Compl. XIV, R. 13; and Compl. XXI, R. 17].

The California courts have recognized the principle that such an intentional and unjustifiable interference with contractual relations is an actionable wrong, even if the relations are at the will of the parties.

Thus, in *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34, 172 P. 2d 867, the Supreme Court of California, after pointing out that the contract, as set forth in the plaintiff's complaint, was terminable at will, said:

“Intentional and unjustifiable interference with contractual relations is actionable in California as in most other jurisdictions. (*Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33 [112 P. 2d 631]; see cases collected in 84 A. L. R. 43.) Recognizing that the fact that a contract is ‘at the will of the parties, respectively does not make it one at the will of others,’ (*Truax*

*v. Raich*, 239 U. S. 33, 38 [36 S. Ct. 7, 60 L. Ed. 131, Ann. Cas. 1917B 283, L. R. A. 1916D 545]) *the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable.*" (Emphasis added.)

*Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34, 39-40, 172 P. 2d 867.

In another recent decision, *Ramona v. Wilbur Ellis & Co.* (1947), 82 Cal. App. 2d 670, 186 P. 2d 1012, the District Court of Appeal similarly stated:

"It is immaterial whether after the dissolution of plaintiff's partnership his contract with Pesquera was one 'at will.' *Speegle v. Board of Fire Underwriters*, *supra*, says (p. 39) that 'at the will of the parties, respectively does not make it one at the will of others,' and that 'the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable.'"

*Ramona v. Wilbur Ellis & Co.* (1947), 82 Cal. App. 2d 670, 673, 186 P. 2d 1012.

In addition it appears to be well recognized that a cause of action exists against one who interferes with an advantageous business relation, whether or not such a relation is established by contract. This principle is established in California as well as being frequently applied and recognized elsewhere.

Thus, in *Buxbom v. Smith* (1944), 23 Cal. 2d 535, 145 P. 2d 305, plaintiff, a publisher and distributor of leaflets and advertising newspapers, negotiated contracts with defendant advertiser. The defendant broke the two contracts a few days later and proceeded to hire plaintiff's distributing crews and supervisor. It does not appear



that there was a contractual relationship between the plaintiff and his employees. In sustaining judgment for \$4,000.00 damages in tort, the court stated as follows:

“This immunity against liability is not retained, however, if unfair methods are used in interfering in such advantageous relations. (Prosser, Torts, p. 1023 *et seq.*, and cases cited.) In this particular case there are special circumstances which bring it outside the ordinary course of competition. Here the record shows that the defendants gained an unfair advantage over the plaintiff through deceptive dealings in the form of a contractual arrangement whereby they deliberately induced the plaintiff to build up his distributing organization to a level consistent with the advertising needs of their then noncompeting business—a chain of public markets—for circulation of a ‘shopping news,’ and then, having acquired through their employment agreement with the plaintiff, complete knowledge of his business methods and records, they undertook to terminate their relationship with him, hired his crews, and assumed control of his valuable enterprise.

\* \* \* \* \*

“. . . A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above. It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees. (See Prosser, Torts, p. 1023 *et seq.*; Rest. Torts, Sec. 768.)”

*Buxbom v. Smith* (1944), 23 Cal. 2d 535, 547, 548, 145 P. 2d 305.

We, of course, recognize that in many instances interferences with normal business relations have been justified on the theory that normal business competition is bound to result in some such interferences and hence that any damages arising therefrom is not actionable. However, we do not believe that the law permits any and all interferences under the guise of competition, and we think that the circumstances of the present case are such as to "bring it outside the ordinary course of competition," within the language of the California Supreme Court decision just above cited, *Buxbom v. Smith, supra*.

There are two other recent cases from other jurisdictions applying the rule of liability for interference with an advantageous business relation.

In *Newark Hwde. & Plumb. Supp. Co. v. Stove Mfrs. Corp.* (1948), 136 N. J. L. 401, 56 A. 2d 605 [Affd. 137 N. J. L. 612, 61 A. 2d 240 (1948)], plaintiff and defendant were competitive stove dealers doing business on the same street in Newark. During the stove shortage a manufacturer shipped stoves consigned to the plaintiff which were mistakenly delivered to the defendant, who sold them, aware of the consignment to the plaintiff. Suit was filed on the theory that the defendant interfered with plaintiff's legal right to receive the stoves, thereby interfering with his business, committing an actionable tort. Held, the plaintiff's complaint set forth a legally sufficient cause of action.

"It is said that the respondent herein, to prevail, must establish a breach of some sort of a relationship, possibly contractual, and that since there was no contractual or other relationship existing between appellant and respondent the claim must fall. We

think not. The existence of contractual relationship is not a requisite of the asserted right of action. The essence of the action is the damage done to the respondent flowing from the wrongful act of appellant, *Louis Kamm, Inc., v. Flink, supra*. *Had the appellant refrained from wrongfully interfering with the transaction, respondent would undoubtedly have realized a profit through the sale of the stoves to retail purchasers. The wrongful interference was, therefore, the proximate cause of respondent's damages.*" (Emphasis added.)

*Newark Hdwe. & Plumb. Supp. Co. v. Stove Mfrs. Corp.* (1948), 136 N. J. L. 401; 56 A. 2d 605, 608.

The second recent case in which liability was found is *Owen v. Williams* (1948), 332 Mass. 356, 77 N. E. 2d 318, 9 A. L. R. 2d 223.

A special nurse brought suit against an influential doctor for inducing a hospital to take her off the list of employable nurses. A jury verdict for the nurse was sustained by Chief Justice Qua.

"The governing principle of law is set forth in Restatement, Torts, §766, in these words, '\* \* \* one who, without a privilege to do so, induces or otherwise purposely causes a third person not to \* \* \* enter into or continue a business relation with another is liable to the other for the harm caused thereby.'"

“And in order to maintain the action it was not necessary that the plaintiff prove that she had a binding contract with the hospital. *It is well settled that an existing or even a probable future business relationship from which there is a reasonable expectancy of financial benefit is enough.*” (Emphasis added.)

*Owen v. Williams* (1948), 332 Mass. 356, 77 N. E. 2d 318, 320, 321, 322, 9 A. L. R. 2d 223.

It should be noted that in *Newark Hardware and Plumbing Supply Co. v. Stove Manufacturing Corporation, supra*, plaintiff and defendant were competitors, as are plaintiff and defendants Bulova in the case at bar; but this fact did not prevent liability in the cited case, nor should it prevent liability here.

The foregoing cases, while analogous in many respects to the situation existing in the case at bar are primarily cited and discussed to indicate that the trial court was in error in holding that relief may be granted only where there has been a breach of a contractual right. On the contrary we believe that relief may be granted whenever there is an unprivileged interference with an advantageous relationship.

In the case at bar there certainly was a *contract* between plaintiff and producer defendants. It is equally certain that defendant Bulova intermeddled with that contract. Even if the contract be considered as one which was, so to speak, at the will of the producer defendant neverthe-

less the fact remains the producers *would not have taken the course they ultimately did except for the wilful and malicious interference of defendant Bulova.*

The allegations of the Complaint show that during the period from June, 1948, through at least February, 1949, the relations of plaintiff and producer defendants were perfectly satisfactory and plaintiff's sign and display with its name affixed had been used and actually included in the motion picture. It is equally clear and it is specifically so alleged, that no change would have been made in the sign except for the wilful and malicious interference on the part of defendant Bulova. Hence, we respectfully submit that the analogy between the cases just above cited and the case at bar are such as to authorize relief to plaintiff, for even if, as producer defendants claim (and plaintiff denies) the contract was at the will of the producer defendants, it does not mean that it was at the will of defendant Bulova.

The action of defendant Bulova in prevailing upon producer defendants to substitute the Bulova name for the Gruen name on plaintiff's sign and display effectively transferred to defendant Bulova all of the benefits, which, without any further action on the part of anyone except the final release of the picture, would have come to plaintiff. We submit these facts clearly state a claim against defendant Bulova, regardless of whether the obligations of defendant Cowan to plaintiff were contractually binding or not.

VI.

**Each of the Stricken Portions of the Complaint Is Material to One or More of the Foregoing Grounds of Recovery for Which Reason the Order Granting the Motion to Strike Was Erroneous.**

We believe that each of the portions of the Complaint stricken is necessary to an understanding of the entire course of conduct between the plaintiff and the defendants. It is plaintiff's contention that it was the duty of the trial court to examine this entire course of conduct and hence that the granting of the motion to strike was erroneous in its entirety. However, without intimating that all of the portions stricken should not be considered by the court in considering each of the various theories upon which plaintiff claims a right to relief, in the following paragraphs we shall briefly summarize the particular points of materiality of the various portions stricken.

(1) The allegations which were stricken in granting Specifications A, B, C, D, E, F, G, H, I, J, K and L of the motion to strike [R. 57-64; Appx. 2-9] are material to the grounds of recovery urged under Points I and II of the Argument which rely upon a contractual undertaking to use plaintiff's name on plaintiff's display in the motion picture in question.

(2) The allegations which were stricken in granting Specifications G, H, I, J, K and L of the motion to strike [R. 60-64; Appx. 6-9] are material to the ground of recovery urged under Point III of the Argument which relies upon an election or an estoppel to deny

an election to use plaintiff's name on plaintiff's display in the motion picture in question.

(3) The allegations which were stricken in granting Specifications B, F, P and Q [R. 58, 60 and 66; Appx. 3, 5, 11 and 14] are material to the ground of recovery urged under Point IV of the Argument which relies upon the unauthorized use by defendants of plaintiff's property right in the concretely embodied idea, and the use of the sign in the motion picture for a purpose other than that authorized by plaintiff.

(4) If it is determined that defendants Cowan were under a contractual obligation to plaintiff, the breach of which obligation was induced by defendants Bulova, then it is apparent that all portions of the Complaint establishing the contractual obligation are also necessary in establishing the liability of the defendants Bulova. In addition, however, the allegations which were stricken in granting Specifications M, N, O and P [R. 64-66; Appx. 9-11] are particularly material to plaintiff's claim against defendants Bulova, based upon the inducing of a breach of contract. With respect to plaintiff's claim against defendants Bulova based upon interference with an advantageous business relation, it is again necessary to consider the entire course of conduct of the parties.

(5) There are other portions of the motion to strike, the granting of which seems clearly erroneous in the event that a claim for relief is stated under any of the theories relied upon by plaintiff. These include:

(a) The allegations with respect to the removal of plaintiff's name and the substitution of the name "Bulova" and the state of mind of producer defendants and defendants Bulova accompanying the re-

moval and substitution, set out in Specifications N, O and S of the motion to strike [R. 65, 66 and 67; Appx. 10 and 14];

(b) The allegation of the loss to plaintiff of the value of the unique stunt and special sign and display conceived by plaintiff, set out in Specification Q of the motion to strike [R. 66; Appx. 14];

(c) The allegation of damage to plaintiff's competitive position, reputation and good will, set out in Specification R of the motion to strike [R. 66; Appx. 14]; and

(d) The allegation that all of the acts of the defendants were willful, malicious and oppressive, entitling the plaintiff to punitive damages, set out in Specification S of the motion to strike [R. 66, 67; Appx. 14].

We submit that upon the authorities cited in the third paragraph of our Argument, the Motion to Strike should have been denied in its entirety.



### Conclusion.

The courts have ruled innumerable times that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to any relief under any state of facts which could be proved in support of the claim. No such certainty here appears, but on the contrary, the Complaint clearly discloses that plaintiff is entitled to relief on one or more theories.

For all of which reasons it is submitted that the judgment below and each and every part thereof should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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## APPENDIX.

Second Amended and Supplemental Complaint for  
Injunction, Damages and Exemplary Damages.  
[R. 2-24.] (Photostatic exhibit [R. 25-29] omitted.)

(Each portion of the Complaint stricken by the court below is underscored and is preceded in brackets by the capital letter which was used to designate that portion in the motion to strike.)

COMES now the plaintiff, THE GRUEN WATCH COMPANY, an Ohio corporation, and for grounds of complaint against the defendants herein, and each of them, complains and alleges as follows:

### I.

Plaintiff is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of Ohio; defendant Artists Alliance, Inc., is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of California; defendant Lester Cowan is and at all times herein mentioned was a citizen of the State of California and is and at all times herein mentioned was doing business in the State of California under the name "Lester Cowan Productions"; the true character or capacity of the defendant Lester Cowan Productions is unknown, but this plaintiff is informed and believes and therefore alleges that said Lester Cowan Productions is and at all times herein mentioned was organized and existing under the laws of the State of California and doing business in the State of California; defendant Bulova Watch Company, Inc., is

and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of New York and is and at all times herein mentioned has been present and doing business in the State of California. Defendants DOE I, DOE II, DOE III, DOE IV, DOE V and DOE VI are designated by fictitious names because their true names and capacities are unknown to plaintiff; plaintiff is informed and believes and therefore alleges that they are and each of them is a citizen of a State other than Ohio and plaintiff will ask leave of Court to substitute the true names and capacities of such defendants by amendment as soon as such true names are discovered. Defendants Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III and Doe IV and each of them will for convenience hereinafter sometimes be referred to as "defendants Cowan." Defendants Bulova Watch Company, Inc., Doe V and Doe VI and each of them will for convenience hereinafter sometimes be referred to as "defendants Bulova." The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

## II.

On and for some time prior to May 24, 1948, Walter E. Kline was an agent of plaintiff, acting on behalf of plaintiff, at Los Angeles, California. [A] On or about said date, the defendants Cowan advised the said Kline of the said defendants' plans and intentions to make a feature length motion picture in which the Marx Brothers would be co-starred, and further advised the said Kline that certain scenes and sequences in the motion picture would be devoted to the activities of one or more of the said Marx Brothers in connection with various advertising displays.

On or about the same date said defendants Cowan requested the said Kline to obtain from any noncompeting advertisers represented by him, agreements in connection with the said defendants' use of signs and displays advertising the products of said noncompeting advertisers. Plaintiff was then among the advertisers represented by the said Kline, but the defendants Bulova were not. [B] Plaintiff is informed and believes and therefore alleges that at said time the script of said motion picture did not contain a clock sequence or stunt but that the said Kline prior to the signing of the memorandum of agreement, hereinafter referred to in Paragraph IV, conceived the clock sequence or stunt which was ultimately used by defendants Cowan, and also suggested the idea of a clock of his client Gruen being used in connection therewith.

### III.

[C] Thereafter at said special instance and request of said defendants Cowan, the said Kline obtained from plaintiff an agreement for defendants Cowan to use in said motion picture a sign and display advertising plaintiff's products, upon the condition and understanding that the shots of plaintiff's said special sign and display would be used and displayed in said motion picture. Said Kline thereupon advised defendants Cowan of his receipt from plaintiff of said agreement, and said defendants thereupon agreed with plaintiff that in consideration of plaintiff's authority and permission to use plaintiff's said contemplated special sign and display in said motion picture and in consideration of plaintiff's constructing and paying the cost of said sign and display, said defendants would use said sign and display in said motion picture.

IV.

[D] Concurrently with the agreement referred to in Paragraph III, and in recognition of the fact that due to circumstances beyond the control of defendants Cowan it might be necessary to cut the scene containing plaintiff's display from said picture, it was understood and agreed between plaintiff and the defendants Cowan that in such event defendants Cowan would bear the cost of said sign and display. At the same time it was understood and agreed between plaintiff and the defendants Cowan that defendants Cowan would bear the cost of said sign and display if said motion picture was not released to the general public prior to January 1, 1950.

V.

Thereafter and between about June 22, 1948, and about July 3, 1948, plaintiff and defendants Cowan executed a memorandum of agreement dated June 22, 1948, which said memorandum was intended to and did embody directly and by reference, the said prior oral agreements of the parties. [E] The "agreement" referred to in Paragraph 2 of said memorandum dated June 22, 1948, was and is the agreement set out in Paragraph III hereof. That portion of paragraph 4 of said memorandum which provided that defendants Cowan would pay plaintiff for the sign or display in the event said sign or display was "not actually included in the picture", was intended to and did express the parties' additional concurrent understanding and agreement set out in Paragraph IV hereof. A copy of said memorandum of agreement dated June 22, 1948, is attached hereto, marked Exhibit "A" and is hereby referred to and made a part hereof as though here set forth at length.



VI.

The Marx Brothers, known as Chico, Harpo and Groucho, are comedians of international renown, and the feature length motion picture "Love Happy" starring them was and is expected to be and in the normal course of events will be seen by many millions of people in the United States and throughout the world, and the rights of the plaintiff acquired under the aforesaid agreements were and are unique and of great value. The Gruen line of watches manufactured by plaintiff is one of the leading brands of watches in the United States and throughout the world, and plaintiff spends annually in advertising its products hundreds of thousands of dollars, and defendants Cowan, by virtue of said agreements, acquired valuable rights from plaintiff, to wit, the right to use plaintiff's sign and display, including its nationally advertised name and products, in the said motion picture.

VII.

In compliance with the provisions of the hereinabove mentioned agreements, plaintiff, at its own cost, caused to be constructed and delivered to defendants Cowan a specially designed advertising sign and display consisting of a large sign bearing a neon illuminated clock, swinging pendulum, and the words "Gruen Watch Time". [F] In addition to the actual cost of construction, plaintiff expended a substantial amount of time, thought and effort in the conception and design of said special sign and display, and said special sign and display was actually conceived by, was the original idea of the plaintiff, and was and is the property of the plaintiff. Said plaintiff's special sign and display was, pursuant to said agreements, used by defendants Cowan in the County of Los Angeles, State

of California, in the production of said motion picture starring the Marx Brothers, which picture originally was entitled "Hearts and Diamonds" but which thereafter was and now is entitled "Love Happy". The filming of that portion of said motion picture, which included plaintiff's said sign and display, was completed on or about the end of August, 1948 and the said sign and display of plaintiff, having fully served the purposes of said agreements and of defendants Cowan, was thereupon returned by defendants Cowan to plaintiff's possession in Los Angeles, and said sign and display has been in its possession at all times since. At no time did plaintiff authorize defendants Cowan to use or utilize plaintiff's said special sign and display except for the purpose of advertising plaintiff's products through the medium of said motion picture; nor did plaintiff ever authorize defendants Cowan to permit any competitor of plaintiff to use or utilize or obtain any benefit from the use of plaintiff's said special sign and display.

### VIII.

[G] After the defendants Cowan had used plaintiff's said special sign and display in the production of said motion picture, the said defendants Cowan encouraged and permitted Life Magazine, a nationwide weekly publication, and one Slim Aarons, a professional photographer employed by said Life Magazine, to take photographs of said sign and display and provided Aarons and Life Magazine with other photographs of said sign and display which were actually taken from the motion picture film. Concurrently therewith defendants Cowan advised plaintiff of their plan and desire to obtain publicity for their said motion picture from Life Magazine and plaintiff, acting

solely upon the understanding and belief that said defendants had finally determined that plaintiff's display was satisfactory and was in and would remain in said motion picture, authorized and permitted the said defendants to release said photographs for publication. Defendants Cowan thereupon, and with full knowledge of plaintiff's said understanding and belief, released all of said photographs for publication, all for the sole purpose of publicizing and promoting said defendants' motion picture "Love Happy".

IX.

[H] Thereafter and under date of September 10, 1948, defendants Cowan wrote plaintiff a letter and enclosed therewith the photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit "B," and is hereby referred to and made a part hereof as though here set forth at length.

X.

[I] Thereafter and under date of October 4, 1948, defendants Cowan wrote plaintiff an additional letter and enclosed therewith the additional photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit "C," and is hereby referred to and made a part hereof as though here set forth at length. [J] In reliance upon the prior agreements, representations and actions of defendants Cowan, plaintiff released said photographs for publication in jewelers' trade papers and said photographs were actually published therein, and likewise in reliance upon said agreements, representations and actions of defendants Cowan, plaintiff ad-

vised its dealers throughout the United States that Gruen would be advertised in said defendants' motion picture. Said release to the jewelers' trade papers and said advice to plaintiff's dealers throughout the United States gave valuable publicity to the said defendants and their motion picture. Plaintiff would not have made said releases to jewelers' trade papers nor given said advice to its dealers except for its understanding and belief theretofore induced by the agreements, representations and actions of defendants Cowan that its special advertising sign and display was and would be in the said motion picture.

## XI.

[K] Thereafter, and with the knowledge and permission of defendants Cowan, Life Magazine published in its issue dated February 7, 1949, a four-page article including (9) photographs or shots stated as being from "The Marx Brothers forthcoming motion picture 'Love Happy.'" Said article likewise made certain other statements and representations to the general public, all as is more particularly set forth in said article and in the captions of the said photographs. A copy of the table of contents page, and of said news article and the photographs therein contained, is attached hereto, marked Exhibit "D," and is hereby referred to and made a part hereof as though here set forth at length. Plaintiff is informed and believes and therefore alleges that prior to said publication, the defendants Cowan knew or had good reason to know that they would not use the name Gruen in their said motion picture, but they failed to advise either Life Magazine or the plaintiff of said fact.

XII.

[L] By their acts of authorizing and permitting the release of the said Life Magazine article and the two said photographs which depicted the Gruen name and display, defendants Cowan represented to the public and to plaintiff that said Gruen name and display would be in said forthcoming motion picture, which said defendants Cowan had previously represented to plaintiff (by their letter dated October 4, 1948) would have its world premiere on February 12, 1949, only five days after said Life Magazine publication on February 7, 1949, and by their said acts the said defendants represented to the public and to plaintiff that the photographs reproduced in said Life Magazine article constituted a portion of the final version of the motion picture "Love Happy" and that said photographs would be contained in said motion picture when it was released to the general public.

XIII.

[M] After completion of said motion picture, and after said release of said Life Magazine article and photographs under date of February 7, 1949, and after plaintiff had released said publicity for the said motion picture to jewelers' trade papers and to plaintiff's dealers, defendants Cowan demanded that plaintiff pay them the sum of at least Twenty-Five Thousand Dollars (\$25,000.00) cash, allegedly to be used by said defendants for the purpose of jointly advertising said defendants' motion picture and plaintiff's products in national advertising, and defendants Cowan advised plaintiff that unless plaintiff complied with said demand said defendants Cowan would not only remove

from the motion picture any and all shots of the display provided by plaintiff but in addition would substitute in their place shots advertising the product of one of plaintiff's major competitors in the watch industry. [N] Said removal and substitution were threatened, and thereafter carried out, by defendants Cowan arbitrarily, wilfully, maliciously, in bad faith and for the purpose of exacting an additional financial contribution from plaintiff over and above that called for by the agreements of the parties, and for the purpose of injuring the business and good will of plaintiff. [O] Plaintiff refused to comply with said demand. Plaintiff is informed and believes and therefore alleges that while defendants Cowan were making said threats and demands upon plaintiff, they and defendants Bulova were already, but without the knowledge of plaintiff, negotiating to substitute Bulova's name in said motion picture in place of plaintiff's name.

#### XIV.

Plaintiff is informed and believes and therefore alleges that prior to the commencement of the negotiations referred to in Paragraph XIII hereof, defendants Bulova were aware of the obligations of defendants Cowan to plaintiff and of the facts set forth in Paragraphs II, III, IV, V, VI, VII, VIII and XI hereof, but defendants Bulova nevertheless induced defendants Cowan to disregard their obligations to plaintiff and to enter into and carry out a contract with defendants Bulova, whereby, for a monetary consideration (the precise amount of which is unknown to plaintiff), paid by defendants Bulova to defendants Cowan, the said defendants Cowan would delete the name Gruen from the motion picture "Love

Happy” and would substitute in said motion picture the name Bulova in place of the name Gruen. That said acts of defendants Bulova were all committed with the purpose and intent thereby to deprive plaintiff of the expected fruits of its agreements and understandings with defendants Cowan and to interfere unfairly and improperly with and to injure plaintiff and plaintiff’s business, dealer relationships, competitive position, reputation and good will.

XV.

Thereafter, under date of April 20, 1949, defendants Cowan notified plaintiff that they had eliminated and would not use in the motion picture “Love Happy” any reference to plaintiff. Plaintiff has at all times refused to acquiesce in said notification and at all times has insisted that defendants Cowan must retain plaintiff’s name and special sign and display in said motion picture and must remove the name Bulova from plaintiff’s said special sign and display. Plaintiff notified defendants Bulova of its said position as soon as it learned of the negotiations between defendants Cowan and defendants Bulova, and said notification took place prior to the ultimate world premiere referred to in Paragraph XVII hereof.

XVI.

[P] Despite the lack of authority of defendants Cowan, of which lack of authority defendants Bulova were fully aware, and in wilful and malicious derogation of plaintiff’s rights in the premises, the defendants herein and each of them have conspired to commit and actively aided and abetted each other in the commission of the following acts:

(1) The defendants altered the motion picture containing plaintiff’s said specially constructed sign and display

in a material respect, to wit, by removing the name "Gruen" therefrom; and

(2) They actually included plaintiff's said special sign and display in the motion picture as released to the general public but inserted the name "Bulova" in plaintiff's said sign and display in place of and in lieu of the name "Gruen."

Said two acts just referred to, in so far as defendants Bulova are concerned, were committed with the purpose and intent thereby to deprive plaintiff of the reasonably expected fruits of its agreements and understandings with defendants Cowan and to interfere unfairly and improperly with and to injure plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will.

## XVII.

Subsequent to the filing of the original complaint herein, said motion picture "Love Happy" had what was advertised as its world premiere showing. The special advertising sign and display, which was conceived, constructed and paid for by plaintiff, has been used and "actually included" in the final version of said motion picture, but the name "Gruen" has been erased from said film by the defendants and in place thereof, the name "Bulova" has been inserted. Plaintiff is informed and believes and therefore alleges that despite the threats of defendants Cowan, to which reference is made in Paragraph XIII hereof, the said defendants Cowan would not have erased the name "Gruen" from said motion picture save and except for the fact that they were induced so to do by defendants Bulova. Plaintiff is informed and believes and therefore alleges that said motion picture now is being released and shown by



defendants Cowan at motion picture theatres throughout the United States, that unless restrained and enjoined from so doing, said defendants will continue to release and show said motion picture, including plaintiff's said display which has been mutilated and distorted as aforesaid; and, further, that defendants and each of them also are carrying out a nationwide program jointly advertising said motion picture and Bulova products; and that unless restrained and enjoined from so doing, the defendants and each of them will continue to carry out such advertising program.

### XVIII.

As a result of the aforesaid actions and threatened actions by the defendants, great, irreparable and continuing injury and damage is being inflicted and will continue to be inflicted upon plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will: (1) through the loss of unique and valuable advertising which plaintiff reasonably expected to receive, was entitled to receive and would have received if defendants Bulova had not induced defendants Cowan to breach their obligations to plaintiff (2) through the ridicule to which plaintiff has been and will continue to be subjected by the jewelry trade and the public if defendants are permitted to continue to show said motion picture containing plaintiff's special sign and display but with Bulova's name inserted therein as hereinabove alleged or are permitted to continue to advertise jointly said picture and Bulova's products as hereinabove alleged; and (3) through defendants' mutilation, distortion and use of plaintiff's said specially designed and conceived sign and display to the advantage and profit of the defendants and each of them

without plaintiff's consent and in derogation of plaintiff's rights. Unless restrained and enjoined by this Court, the defendants and each of them will continue to commit said damaging acts.

XIX.

Plaintiff has no plain, adequate or speedy remedy at law in connection with the foregoing.

XX.

As a direct and proximate result of the actions of the defendants and each of them as aforesaid, plaintiff has lost and is losing world-wide advertising of very unique and substantial value, [Q] and has lost and is losing the value of the unique stunt and special sign and display conceived by plaintiff, [R] and plaintiff and plaintiff's business, competitive position, dealer relationships, reputation and good will have likewise heretofore been and are being substantially damaged. Said damages are of such character as to be difficult of ascertainment and computation, but plaintiff estimates that it has already been damaged in an amount in excess of One Hundred Thousand Dollars (\$100,000.00).

XXI.

[S] All of the aforesaid actions of defendants and of each of them were wilful, malicious and oppressive and by virtue of such wilfulness, malice and oppression plaintiff is entitled to recover damages for the sake of example and by the way of punishing the defendants and each of them in the additional sum of One Hundred Thousand Dollars (\$100,000.00).

WHEREFORE, plaintiff prays:

(1) That defendants, Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III, and Doe IV and the agents and servants of each of them be ordered to delete the name "Bulova" from said motion picture and to restore the name "Gruen" therein, and that they be enjoined permanently from again removing said name "Gruen" therefrom.

(2) That defendants, Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III, and Doe IV and the agents and servants of each of them be enjoined permanently from including in said motion picture "Love Happy" any shots of any display advertising in any way the products of defendant Bulova Watch Company, Inc., or of any other competitor of plaintiff.

(3) That defendants, Bulova Watch Company, Inc., Doe V and Doe VI and the agents and servants of each of them be enjoined permanently from advertising their products jointly with the motion picture "Love Happy" and from using plaintiff's said display in said picture, or at all.

(4) That plaintiff recover of and from the defendants and from each of them the sum of One Hundred Thousand Dollars (\$100,000.00), general damages, and such additional sums as may have accrued to the date of the injunction hereinabove prayed for.

(5) That plaintiff recover of and from the defendants and from each of them the additional sum of One Hundred Thousand Dollars (\$100,000.00), as exemplary or punitive damages.

(6) That defendants pay to plaintiff the costs of this action, and

(7) That plaintiff have such other, different and further relief as may be just.

Exhibit "A"

Webster 6156

Established 1918

Walter E. Kline

Public Relations

8445 Melrose Avenue

Hollywood 46, California

June 22, 1948

Lester Cowan Productions

General Service Studios

1049 North Las Palmas

Hollywood, California

Gentlemen:

In confirmation of our present understanding it is hereby agreed as follows:

1. You have advised me of your plans and intentions to produce a feature length sound and talking motion picture presently entitled "Hearts and Diamonds," in which the Marx Brothers will be co-starred. You have further advised me that certain scenes and sequences in the picture will be devoted to the activities of one or more of the Marx Brothers in connection with various advertisings and displays.

2. Pursuant to your request therefor I have obtained from the hereinafter specified advertisers agreements in connection with your use of their respective signs and displays. Such advertisers and their signs and displays are as follows:

a. The General Petroleum Corporation whose advertising sign displays the "Flying Red Horse" in connection with its sale of Mobilgas.

b. The Fisk Tire Company whose advertising sign displays a boy and a candle bearing the slogan "Time to Retire."

c. The Brown and Williamson Tobacco Corporation (Kool Cigarettes), Ted Bates Agency.

d. The Gruen Watch Company.

e. One or more other companies using advertising signs or displays which may hereafter be included in the terms of this agreement by our mutual written statement to that effect.

3. You understand that some expense will be incurred by me or my principals in preparing for your use the above specified advertisements or displays. On behalf of my respective principals I am privileged to state that the cost of constructing such signs and displays which will be borne by my respective principals provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public; and further provided that such picture is actually released to the general public not later than January 1, 1950.

4. It is therefor understood and agreed that you will bear the cost incurred in connection with the construction and erection of any or all of such signs or displays which are not actually included in the picture substantially in the

manner presently represented to you; it being further understood that you will bear the cost of all of such signs and displays if the said picture is not released to the general public prior to January 1, 1950. At your request, of course, we shall furnish you with an itemized statement of all costs so incurred.

If the above is in accordance with your understanding of our agreement, please indicate the same by signing in the space provided therefor below.

Very truly yours,

/s/ WALTER E. KLINE.

Approved and Accepted:

LESTER COWAN PRODUCTIONS,

An Artists Alliance, Incorporated, Production, Produced by Lester Cowan.

By /s/ LESTER COWAN. [17]

Exhibit "B"

Phone GRanite 3111

Artists Alliance, Inc.  
1040 North Las Palmas  
Hollywood 38, California

September 10, 1948

Mr. H. L. Nations  
Public Relations Director  
Gruen Watch Company  
Time Hill  
Cincinnati 6, Ohio

Dear Mr. Nations:

Enclosed please find some 4x5 photographs of the action of the Gruen Watch sign in the current Lester Cowan production, "Love Happy." The sign gets a tremendous play in the picture and you will note that Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film.

In connection with this tieup, if you care to do so, send me watches which can be prominently used in connection with the picture and we will photograph them on the wrists of Vera-Ellen, Marion Hutton, and Ilona Massey, the three feminine stars of the film, and the three Marx Brothers which you may have to use as you see fit.

Kindest regards,

Cordially,

/s/ R. E. ARMSTRONG,  
Dir. of Publicity & Adv.

REA/vm  
Encl.

Exhibit "C"

Phone GRanite 3111

Artists Alliance, Inc.  
1040 North Las Palmas  
Hollywood 38, California

October 4, 1948

Mr. H. L. Nations  
Public Relations Director  
Gruen Watch Company  
Time Hill  
Cincinnati 6, Ohio

Dear Mr. Nations:

Enclosed please find photographs of Harpo Marx swinging on the pendulum of the Gruen Watch sign. This is as closeup a shot as we could make and still show the sign.

Fred Kline of Walter Kline's office has mentioned that he has discussed a co-operative newspaper campaign with you in conjunction with the showing of this picture. If you have any details, I would appreciate same. Our first release date on the picture will be Lincoln's birthday with a world premiere in Cincinnati, followed by dates in Detroit, Chicago and New York. In all probability we will have Vera-Allen, Ilona Massey and possibly the Marx brothers for personal appearances with the premiere.

Would also appreciate hearing your reaction to the brochure sent you regarding the proposed special train.

Kindest regards.

Sincerely,

/s/ R. E. ARMSTRONG,  
Dir. of Publicity & Adv.



**Exhibit "D"**

Note: This photostatic exhibit is omitted from this Appendix, but is set forth in full in the printed Transcript of Record. [See R. 25-29.]

